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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/523,541	06/17/2005	Larry B. Brandenburger	160-P-1617USWO	7511
23322	7590	10/26/2007	EXAMINER	
IPLM GROUP, P.A. POST OFFICE BOX 18455 MINNEAPOLIS, MN 55418			MOORE, MARGARET G	
			ART UNIT	PAPER NUMBER
			1796	
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			10/26/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/523,541	Applicant(s) BRANDENBURGER ET AL.	
	Examiner Margaret G. Moore	Art Unit 1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 August 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 2, 4 and 6 to 37 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 9, 11, 12 and 24-26 is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4, 6 to 8, 10, 13 to 23, 27, 29 to 31, 33, 36 and 37 is/are rejected.
- 7) ☒ Claim(s) 28, 32, 34 and 35 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. Claims 1, 2, 6 to 8, 10, 13 to 23, 27, 29 to 31, 36 and 37 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Tobias et al.

The rationale for this rejection is consistent with that noted in the previous office action. While claim 1 has been amended to exclude the term "about", it remains a modifying term in the prior art. Thus "about 48" as found in Tobias et al. is given a degree of tolerance and allows for concentrations slightly about 48. With this in mind one can consider the degree to tolerance given to the limit "about 48" as anticipating 50.¹

On the other hand, the Examiner also maintains that the difference between "about 48" and 50 is close enough that one having ordinary skill in the art would have expected them to have the same properties. Applicants traverse this position as an inappropriate standard for obviousness; however, their attention is drawn to MPEP 2144.05 I. which notes that this is, in fact, a proper consideration for obviousness.

Reference to the teachings in Piana is not persuasive in establishing any unobviousness, again because the difference between the prior art and that claimed is such that one would not expect a difference in properties. Again note that the prior art results in the same level of hardness as the claimed composition.

3. Claims 1, 2, 4, 8, 10, 13 to 15, 19 to 23, 27, 31, 33, 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Piana.

This rejection relies on the rationale of record. Applicants' traversal is not persuasive since, as noted above, MPEP 2144.05 supports the Examiner's position of obviousness. The fact that this example is a comparative example does not take away from the this position of obviousness.

¹ See In re Ayers, 69 USPQ 109 in which "at least about 10%" was held to be anticipated by "about 8%".

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4. Claims 28, 32, 34 and 35 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. This is consistent with the subject matter that was indicated as being allowable in the previous office action.

5. Claims 9, 11, 12, 24, 25 and 26 are allowed for reasons of record.

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Margaret G. Moore whose telephone number is 571-272-1090. The examiner can normally be reached on Monday and Wednesday to Friday, 10am to 4pm.



Margaret G. Moore
Primary Examiner
Art Unit 1796

mgm
10/24/07